2007

Sharon Williams and Lynn Williams v. Stags Car Club : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SHARON WILLIAMS and LYNN WILLIAMS,

Appellants,

STAGS CAR CLUB, a Voluntary Unincorporated Association; RALPH S. WIGGINS, and JOHN DOE 1; DENNIS BENCH; JOHN DOE 2; BRENT BODILY; JOHN DOE 3; ADAM CHRISTOFFERSON; JOHN DOE 4; CRAIG CHRISTOFFERSON; JOHN DOE 5; ROBERT EAMES; JOHN DOE 6; DEVON ELLIS; JOHN DOE 7; MICKEY ELLIS; JOHN DOE 8; JERRY PULMER; JOHN DOE 9; JIMMY GERMER; JOHN DOE 10; DALE HAMMON; JOHN DOE 11; SCOTT HAMMON; JOHN DOE 12; MIKE HOWELL; JOHN DOE 13; BRENT KEYES; JOHN DOE 14; RAY PAGE; JOHN DOE 15; DON PALFREYMAN; JOHN DOE 16; DAVE SQUIRES; JOHN DOE 17; GREG WARG; JOHN DOE 18; MAC WHITE; JOHN DOE 19; BRUCE WOOLSEY; JOHN DOE 20; RYAN WOOLSEY; JOHN DOE 21; BJ BURKDOLL; JOHN DOE 22; JIM BURKDOLL; JOHN DOE 23; GARY MCDANIEL; JOHN DOE 24; JIM VOWLES; JOHN DOE 25; JOHN ELWESS; JOHN DOE 26; HAROLD LUNI; JOHN DOE 27; BILL NEW; JOHN DOE 27; BILL NEW; JOHN DOE 28; SCOTT NEW; JOHN DOE 29; JOHN NEW; JOHN DOE 30; BRAD NEW; JOHN DOE 31; JACK HARRIS; JOHN DOE 32; BRUNO PERRY; JOHN DOE 33; LYLE MASON; JOHN DOE 34; BOB LARVEE, JR., AND JOHN DOES 35-100.

Appellees.

BRIEF OF APPELLEES

ALL INDIVIDUAL DEFENDANTS 1-34

Appellate Case No. 20070029

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Section 78-2a-3(2)(j) (2006).

STATEMENT OF THE ISSUES

1. Whether the district court properly granted the Individual Defendants' motion to dismiss because no duty of care is owed to an injured third-party by one member of a club for the tortious conduct of another member of the club.

Standard of Review: The grant of a motion to dismiss pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure is a question of law reviewed for correctness. See, e.g., Krouse v. Bower, 2001 UT 28, ¶2, 20 P.3d 895.

Preservation: This issue was preserved because the court ruled on the motion to dismiss. (R. 1366-70.); Spears v. Warr, 2002 UT 24, ¶32, 44 P.3d 742 ("By ruling on the question, the trial court demonstrated that the issue was brought to its attention, and the issue has been sufficiently preserved for our review.")

2. Whether Plaintiffs preserved for appeal their request for leave to amend a second time by making a passing reference at the end of oral argument, but without filing a motion, memorandum, or proposed second amended complaint.

Standard of Review: A ruling on a motion to amend a complaint is reviewed under the abuse of discretion standard. See, e.g., Neztsosie v. Meyer, 883 P.2d 920, 922 (Utah 1994) ("We will not disturb a trial court's ruling on a motion to amend a complaint absent a

clear abuse of discretion."), quoted in Holmes Dev. L.L.C. v. Cook, 2002 UT 38, ¶56, 48 P.3d 895.

Preservation: This issue was not preserved for appeal for the reasons discussed in Section II.

3. Whether this court should review the matter as certified by the district court pursuant to Rule 54(b) or pursuant to Rule 5 of the Utah Rules of Appellate Procedure to provide finality to the Individual Defendants.

Standard of Review: The initial question of whether an order is eligible for certification under rule 54(b) is a question of law which is reviewed for correctness. Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1100 (Utah 1991). However, a certain measure of discretion should be granted to the district court to determine whether "there is no just reason for delay" of the appeal. Id. at 1101. Whether the matter is heard pursuant to Rule 5 of the Utah Rules of Appellate Procedure is completely within the discretion of the appellate court. Id. at 1102 (quoting Utah R. App. P. 5(e), "An appeal from an interlocutory order may be granted . . . [if] a determination of the correctness of the order before final judgment will better serve the administration and interests of justice.").

Preservation: The 54(b) certification issue was preserved because the court ruled on the Individual Defendants' motion for Rule 54(b) certification. (R. 1366-70 (Order); R. 1521-26 (Findings and Rationale for Certifying Order as Final Per Rule 54(b).); Spears, 2002 UT 24 at ¶32, 44 P.3d 742.

STATEMENT OF THE CASE

Plaintiff ShaRon Williams was injured by Ralph Wiggins at a "steak fry" sponsored by the Stags Car Club. Mr. Wiggins ran over Ms. Williams in his truck. Ralph Wiggins was a member of the club. He was the only individual who actively participated in the tort against Ms. Williams. Notwithstanding, the other members of the club were sued in their individual capacities. Plaintiffs claim that the other members of the club failed to watch out for Ms. Williams and warn her of Mr. Wiggins, and that the club members were vicariously liable for Mr. Wiggins' negligence by virtue of their membership in the club. These "Individual Defendants" include all defendants except for Ralph Wiggins and the entity Stags Car Club. There is no allegation that the Individual Defendants actively participated in the tort.

The thirty-four Individual Defendants (other than Ralph Wiggins) were properly dismissed for owing no duty of care to plaintiffs. Utah law directs that before a duty of care may be imposed based upon an omission or failure to act, a special relationship must exist. There is no special relationship between Ms. Williams and the Individual Defendants, and therefore no duty.

The special relationship requirement in Utah is founded on sound public policy and common sense. To hold otherwise would expose individuals with no fault for a tort committed by a member of a club or unincorporated association, and to do so would be contrary to Utah's fault-based tort law.

Case law from other jurisdictions also supports dismissal of the Individual Defendants. See, e.g., Thomas v. Dunne, 279 P.2d 427 (Colo. 1955). Based upon the active participation requirement outlined in other jurisdictions, Ralph Wiggins is the only proper defendant because he is the only one who actively participated in the commission of the tort.

The Plaintiffs failed to preserve their request to file a second amended complaint, a request they made at the end of the motion to dismiss hearing in an attempt to avoid dismissal. Because Plaintiffs' request for leave to amend was merely a request in passing, it was not preserved for appeal. Moreover, Plaintiffs did not meet the requirements for seeking leave to amend a pleading. No motion was filed; no memorandum of points and authorities was filed in support; and no proposed amended complaint was submitted for the district court to consider.

The district court properly certified the matter pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. Plaintiffs complain the district court's findings and rationale were entered after they filed the notice of appeal. However, the purpose of the rule was satisfied because this Court received findings and rationale that permit it to determine whether certification is proper. Regardless, this court can always exercise its discretion to hear this matter as an interlocutory order pursuant to Utah Rule of Appellate Procedure 5. Remanding the matter for the district court to enter the same certification order a second time will simply result in a waste of judicial resources and result in further unnecessary delay.

STATEMENT OF FACTS [1]

A. The allegations in the complaint

Plaintiffs and other members of the Stags Car Club attended a "steak fry." (R. 091 at ¶¶7-8.) The steak fry was hosted by the Stags Car Club for its members and their guests. (Id.) Stags Car Club is a "Voluntary Unincorporated Association." (R. 090, Caption, and R. 091 at ¶2.)

At the steak fry, Plaintiff ShaRon Williams lay down to rest. (R. 092 at ¶10.) She was subsequently run over by a truck owned and driven by Ralph Wiggins, a member of the club. (R. 092 at ¶¶ 11-12.)

The initial complaint sued Ralph Wiggins, the Stags Car Club, and John Does 1-100. (R. 001, 007-8.) Plaintiffs alleged that Ralph Wiggins was negligent. (R. 003-4, ¶¶14-17.) Plaintiffs also alleged that the Stags Car Club owed a duty to host a safe event, and that it was "vicariously liable for the negligence of [Ralph Wiggins]." (R. 005-6, ¶¶18-25.) Plaintiffs alleged that the unidentified John Does, as members of the club, owed a duty to ShaRon Williams to warn her of moving motor vehicles. (R. 007, ¶27.) Plaintiffs alleged that the John Does were "vicariously liable for the negligent acts of other members of the unincorporated association" because of "their status as members" of the club. (R. 008, ¶30.)

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[1] A motion to dismiss pursuant to Utah Rule of Civil Procedure 12 assumes as true the facts alleged in the amended complaint. See, e.g., St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991). None of the facts outlined below was a finding of fact, but is an allegation that was assumed as true. Facts may be disputed at trial.

Mr. Wiggins and the club filed answers, an attorney planning meeting was held among counsel for Plaintiffs and the two defendants, and discovery began. (R. 0018-22, Attorney Plan. Mtg. Respondent. & Order; R.0023-079.)

Plaintiffs, Mr. Wiggins, and the club later agreed to allow Plaintiffs to file an Amended Complaint. (R. 077-89.) In the Amended Complaint, in addition to suing Mr. Wiggins and the club, Plaintiffs named thirty four members of the club in their individual capacities (the "Individual Defendants"). (R. 090, Addendum A.) Plaintiffs asserted that each club member owed a duty of care to ShaRon and was individually liable for the accident. (R. 0090-99 at ¶¶13, 26-30.) Plaintiffs alleged that the Individual Defendants, "as members of [the club] and as persons conducting, managing and overseeing the [steak fry]," owed a duty to "exercise a reasonable lookout and reasonable care for persons [at] the event," and to "observe the movement of vehicles at the event and to warn persons of the presence of moving motor vehicles." (R. 096 at ¶27.) Plaintiffs further alleged that the Individual Defendants were "vicariously liable for the negligent acts of other members of the unincorporated association" such as Mr. Wiggins, "[b]y virtue of their status as members of the unincorporated association . . . and as recipients of the privileges and benefits of membership [in the] Stags Car Club." (R.097 at ¶ 30.)

B. The motion to dismiss the Individual Defendants

The Individual Defendants moved to have the claims against them dismissed, filing or joining in a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the

Utah Rules of Civil Procedure. (R. 334-64 (initial motion to dismiss), 409-14 (joinder), 415-17 (joinder), 724-41 (joinder and submission of supplemental authority);747-50 (joinder); 751-55 (joinder); 805-07 (joinder).)[2] No affidavits, deposition testimony, or other facts from any source were submitted in support of the motion to dismiss. (Id.) Indeed, no matters outside of the Amended Complaint were submitted in support of the motion. (Id.)

A hearing on the motion to dismiss was held on November 1, 2006. (R. 824-25.) At the hearing, the district court ruled that it was granting the motion to dismiss and asked counsel to prepare the order. (Non-Numbered Transcript at 33:12 to 37:17.)

At the hearing, the district court made statements from the bench that Plaintiffs claim are factual findings. However, the court and all parties were clear that a motion to dismiss was before the court, and that no findings were necessary. (Tr. at 1:13-18 (Pls.' counsel and court); 2:19-22 (court); 8:13-24, 10:3-23, 11:16-25 (defense and plaintiff's counsel clarifying motion to dismiss); 25:25 to 26:6 (court noting matter restricted to allegations in Amended Complaint); 27:24 to 28:2; 32:12 to 33:11.) The court initially stated, "I don't know if I need

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[2] Initially, Individual Defendant Jimmie Germer filed a motion for summary judgment. (R. 111-147.) After Mr. Germer's motion was completely briefed and noticed for decision, (R. 331-33), the other Individual Defendants filed or joined in a motion to dismiss pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. (R. 334-64 (initial motion to dismiss), 409-14 (joinder), 415-17 (joinder), 724-41 (joinder and submission of supplemental authority); 747-50 (joinder); 751-55 (joinder); 805-07 (joinder).) Mr. Germer also joined in the motion to dismiss. (R. 390-92.) Plaintiffs' also sought to have Mr. Germer's motion for summary judgment continued pursuant to Rule 56(f) (R. 423-604), which was granted by the district court at a hearing on August 30, 2006. (R. 742-45.) At the August hearing, a hearing on the motion to dismiss was scheduled. (R. 742-45.)

to make specific findings," but eventually ruled, "I'm going to grant the motion" to dismiss. (R. 33:25; 34:25 to 35:16.) The order signed by the district court – granting the motion to dismiss – does not include any findings of fact. (R. 1366-70.) The signed order is clear that it grants a "Motion to Dismiss, which was joined by all defendants who are club members, except Ralph Wiggins," and that "plaintiffs fail[ed] to state a claim upon which relief may be granted." (R. 1366-67.) No findings of fact were entered as part of the order signed by the district court granting the motion to dismiss. (Id.)

C. The order granting the motion to dismiss and certifying the matter as final

Proposed orders were exchanged by the parties, but no agreement was reached on an order. (R. 834-47, correspondence over disagreement and exchanged proposed orders.) The district court signed an order dismissing the Individual Defendants and certifying the matter as final pursuant to Rule 54(b) on November 30, 2006. (R. 1366-70, Addendum B.)

Despite seeking to appeal the dismissal of the Individual Defendants, Plaintiffs disagreed with the 54(b) certification – two seemingly contradictory positions. They filed a notice of objection on December 14, 2006, (R. 1407-10), and sent a letter to the district court on November 20, 2006. (R. 834-39,1365 letter and Pls.' proposed order.) However, Plaintiffs offered no reasons why the matter should not be certified as final pursuant to Rule 54(b) (R. 1407-08.) Rather, in their objection filed after the Order was signed, Plaintiffs stated, "because the Court has previously entered its Order Granting Defendants' Motion to Dismiss and Final Judgment Pursuant to Rule 54(b) on November 30, 2006, Plaintiffs assume

that Defendants' motion is moot and will not be addressed by the Court." (R. 1407-08.)

Defendants filed a motion to have findings and rationale entered in support of the Rule 54(b) certification. This motion was filed on November 28, 2006, two days before the order dismissing the Individual Defendants was granted. (R. 848-50 (Mot.), 827-34 (Mem.); 851-54 (joinder); 874-77 (joinder); 1371-73 (joinder); 1375-78 (joinder); 1411-14 (joinder); 1457-59 (joinder).) Plaintiffs again objected to certification, filing a notice of objection on December 26, 2007; but again they offered no reasons why the matter should not be certified as final. Instead of actually opposing the motion, Plaintiffs stated, "because the Court had previously entered its [Order] on November 30, 2006, Plaintiffs assume that Defendants' motion, memoranda, and proposed findings and rationale are moot and will not be addressed by the Court." (R. 1490.) Instead of waiting for an order on the proposed findings and rationale in support of certification, Plaintiffs filed their notice of appeal on December 29, 2006, two days after filing their objection to the certification. (R. 878-81 (notice of appeal); R. 1489-92 (objection to certification.)) In simultaneously opposing certification and seeking to appeal an order dismissing less than all the parties, Plaintiffs apparently sought to appeal an interlocutory order as of right without certification from the district court or leave of this court. Subsequently, on January 17, 2007, the district court signed and entered the Individual Defendants' proposed findings and rationale explaining why certification was proper pursuant to Rule 54(b). (R. 1521-26, Addendum C.) The matter was assigned to the Court of Appeals on February 1, 2007. (R. 1527.)

SUMMARY OF THE ARGUMENT

The Individual Defendants were properly dismissed because they owed no duty of care to protect Ms. Williams from Mr. Wiggins. Plaintiffs allege the Individual Defendants were negligent by omission or failure to act. Plaintiffs claim that the Individual Defendants failed to "exercise a reasonable lookout and reasonable care for [Ms. Williams]," and that they failed to "warn [Ms. Williams] of the presence of moving motor vehicles [i.e. Ralph Wiggins' truck]." (R. 096 at ¶27.) At the same time, the Individual Defendants are accused of vicarious liability "[b]y virtue of their status as members of the unincorporated association . . . and as recipients of the privileges and benefits of membership [in the club." (Am. Compl. at 30.)

To impose a duty based upon an omission of failure to act, a special relationship must exist. Webb v. University of Utah, 2005 UT 80, 125 P.3d 906, Beach v. University of Utah, 726 P.2d 413 (Utah 1986), and Drysdale ex rel. Strong v. Rogers, 869 P.2d 1, 2-4 (Utah Ct. App. 1994). Where no special relationship exists, no duty exists. There is no special relationship between Ms. Williams and the Individual Defendants. The special relationship requirement is Utah precedent, founded on sound public policy and common sense.

Additionally, case law from other jurisdictions also supports dismissal of the Individual Defendants. See, e.g., Thomas v. Dunne, 279 P.2d 427 (Colo. 1955). Pursuant to the active participation requirement outlined in other jurisdictions, Ralph Wiggins is the only proper defendant because he is the only one who actively participated in the commission

of the tort. See Orser v. George, 252 Cal. App. 2d 660 (Cal. Ct. App. 1967); Guyton v. Howard, 525 So.2d 948, 956 (Fla. Ct. App. 1988); Libby v. Perry, 311 A.2d 527, 534 (Me. 1973); Juhl v. Airington, 936 S.W.2d 640 (Tex. 1996).

Plaintiffs' request for leave to file a second amended complaint must be rejected. First, Plaintiffs failed to preserve the issue for appeal. Second, Plaintiffs did not meet the requirements for seeking leave to amend a pleading. Plaintiffs' request for leave to amend was merely a request in passing. No motion was filed; no memorandum was filed in support; and no proposed amended complaint was submitted for the district court to consider.

The district court also properly certified the matter pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. Plaintiffs complain the findings and rationale were entered after an order of dismissal and certification was signed and after they filed their notice of appeal. Notwithstanding, the purpose of the rule was met because findings and rationale were entered that permit this Court to determine whether certification is proper. Regardless, this court can always exercise its discretion to hear the matter pursuant to Utah Rule of Appellate Procedure 5. Remanding the matter for the district court to certify the matter a second time will simply result in a waste of judicial resources and result in further unnecessary delay.

ARGUMENT

I. No duty of care is owed to an injured third-party by one member of a club for the tortious conduct of another member of the club.

The Individual Defendants' motion to dismiss was properly granted because, as a matter of law, no duty of care was owed by the Individual Defendants to the Plaintiffs. This is because, for the reasons outlined in detail below, a member of an unincorporated association, a club, owes no duty of care to a third-party who is injured by the tortious conduct of another member of the club.

A. Dismissal pursuant to Rule 12(b)(6)

1. Dismissal based upon no duty

Dismissal pursuant to Rule 12(b)(6) is proper when the plaintiff is not entitled to relief under the facts alleged. Webb v. University of Utah, 2005 UT 80, ¶9, 125 P.3d 364, 365. A motion to dismiss assumes as true the facts alleged, and challenges the plaintiff's right to recover as a matter of law. See, e.g., Oakwood Village LLC v. Albertson's, Inc., 2004 UT 101, ¶¶8-9, 104 P.3d 1226. "Rule 12(b)(6) dismissals are proper . . . when the plaintiff has complained of negligence, but no factual situation could possibly create a duty of care between the defendant and plaintiff." Tuttle v. Olds, 2007 UT App 10, ¶14, 155 P.3d 893.

The Plaintiffs' only allegation against the Individual Defendants sounds in negligence. (R. 096-98, Am. Compl. ¶¶26-30; and Br. of Appellants at 13-19, characterizing claim against Individual Defs. as a two-fold claim for direct negligence and vicarious liability). To prove negligence, a plaintiff must establish a duty of care. Absent a duty, the plaintiff cannot

recover. Webb, 2005 UT 80 at ¶7, 125 P.3d 906; Beach v. Univ. of Utah, 726 P.2d 413, 415 (Utah 1986); Drysdale ex rel. Strong v. Rogers, 869 P.2d 1, 2-4 (Utah Ct. App. 1994).

Whether a duty exists is entirely a question of law for the court. Smith v. Bank of Utah, Inc., 2007 UT App 89, ¶7, 157 P.3d 817 ("Whether [the defendant] owed [the plaintiff] a duty of care is entirely a question of law to be determined by the court."); see also, e.g., Ferree v. State, 784 P.2d 149, 151 (Utah 1989) ("The issue of whether a duty exists is entirely a question of law to be determined by the court.") (citations omitted).

2. The motion to dismiss was appropriately not converted to a motion for summary judgment

The motion to dismiss was appropriately not converted to a motion for summary judgment because (1) no affidavits or evidence of any kind were presented in support of the motion to dismiss, (2) the district court did not rely on any matters outside of the pleadings – especially since none were presented, (3) the final order signed and entered by the court made no findings of fact, and (4) dismissal is justified without considering matters outside the Amended Complaint. See Tuttle v. Olds, 2007 UT App 10, 155 P.3d 893; Oakwood Village LLC v. Albertsons, Inc., 2004 UT 21, 104 P.3d 1226.

The Plaintiffs complain that "affidavits or other evidence [was] presented in support of [the] motion to dismiss." (Br. of Appellants at 23.) However, this is simply not the case. As is evident in the record, the motion to dismiss and the various joinders to the motion to dismiss filed by the Individual Defendants presented nothing outside of the pleadings. No affidavits or evidence of any kind were presented in support of the motion to dismiss.

Plaintiffs complain that the district court improperly considered matters outside the pleadings. (Br. of Appellants at 20-24.) However, no findings of fact were entered when the court issued its order granting the motion to dismiss. The court stated at the hearing, "I don't know if I need to make specific findings." Nevertheless, in making its ruling, the district court made clear that it was granting the Individual Defendants' motion – a motion to dismiss – stating, "I'm going to grant the motion." (R. 33:25; 34:25 to 35:16.)

Regardless what was said at the hearing, the final order of the court is the signed and entered order. State v. Leatherbury, 2003 UT 2, ¶9, 65 P.3d 1180. In Leatherbury, the Utah Supreme Court explained that where further action is contemplated by the court, such as when instructions are given to prepare an order for signature, statements from the bench and even the court's minute entry are not the final determination. Id. Were it otherwise, there would be no purpose in signing and entering the final order. See id. In the instant case, the district court ruled that it was granting the motion to dismiss and asked counsel to prepare the order. (Non-Numbered Transcript at 33:12 to 37:17.) Accordingly, the final order of the court is the signed and entered order. No findings of fact were entered as part of this order granting the motion to dismiss. None of the alleged findings of fact asserted in the Plaintiff's brief were entered as part of the final order. In addition to not containing any findings of fact, the signed and entered order is clear that it grants a "Motion to Dismiss, which was joined by all defendants who are club members, except Ralph Wiggins," and that "plaintiffs fail[ed] to state a claim upon which relief may be granted." (R. 1366-70.)

Where the trial court does not rely on materials outside the pleadings for its judgment, the motion is appropriately not converted in to a motion for summary judgment, and the granting of a motion to dismiss is properly affirmed. Tuttle v. Olds, 2007 UT App 10, ¶¶ 6-10, 155 P.3d 893; Oakwood Village LLC v. Albertsons, Inc., 2004 UT 21, ¶15, 104 P.3d 1226. In the instant case no affidavits or evidence of any kind were presented in support of the motion to dismiss. The motion to dismiss filed by the Individual Defendants presented nothing outside of the pleadings. Dismissal is justified without considering any statements made by the court at oral argument.

Moreover, even if the trial court should have converted a motion into one for summary judgment because it erroneously considered materials outside of the pleadings, the appellate court can still affirm if dismissal is justified without considering material outside of the complaint. Tuttle, 2007 UT App 10, ¶¶6 & 10, 155 P.3d 893.

In short, pursuant to Tuttle v. Olds and Oakwood Village LLC v. Albertsons, Inc., the matter was appropriately ruled on as a motion to dismiss and not converted to a motion for summary judgment. This court should also affirm the dismissal because dismissal is justified without considering anything outside the pleadings.

B. Utah precedent requires a special relationship to impose a duty of care on the Individual Defendants towards the Plaintiffs

No duty of care is owed by the Individual Defendants to the Plaintiffs because no special relationship exists between them. Where an omission or failure to act is alleged, one individual does not owe a duty of care to another unless a relationship exists between them.

See, e.g., Webb, 2005 UT 80 at ¶¶9-10, 125 P.3d 906; Drysdale, 869 P.2d at 2-4. Thus, absent a special relationship between the Plaintiffs and the Individual Defendants, neither direct nor vicarious liability can be imposed. For the reasons outlined in detail below, no special relationship exists.

1. General rule: no duty of care owed to another absent a special relationship

It is well established in Utah that "[o]rdinarily, a party does not have an affirmative duty to care for another." Beach, 726 P.2d at 415. "The duty of a private citizen to act in aid of another, the duty to protect, arises only where a special relationship is found to exist." Webb, 2005 UT 80 at ¶15, 125 P.3d 906; see also Beach, 726 P.2d at 415 ("The law imposes upon one party an affirmative duty to care for another only when certain special relationships exist between the parties.") In the instant case, a special relationship is necessary to impose a duty.

2. A special relationship must exist to support an allegation of negligence by omission or failure to act

It is especially true that a special relationship must exist when the alleged duty is based upon an alleged omission by the defendant. The Utah Supreme Court made this clear in Webb: "An omission or failure to act can generally give rise to liability only in the presence of some external circumstance – a special relationship." Webb, 2005 UT 80, ¶10, 125 P.3d 906 (in context of explaining that an act carries with it legal accountability for that act, and an omission or failure to act requires a special relationship to impose liability); see

also Drysdale, 869 P.2d at 2-4. The allegations against the Individual Defendants are that they failed to act. Plaintiffs claim that the Individual Defendants failed to "exercise a reasonable lookout and reasonable care for [Ms. Williams]," and that they failed to "warn [Ms. Williams] of the presence of moving motor vehicles [i.e. Ralph Wiggins' truck]." (R. 096 at ¶27.) A special relationship is therefore necessary to impose a duty.

3. Special relationships arise in circumstances of dependence, such as when one assumes responsibility for another's safety or one deprives another of the opportunity for self-protection

The essence of a special relationship is dependence by one party upon the other, or mutual dependence. Beach, 726 P.2d at 415-16. Accordingly, special relationships generally arise when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection.'" Webb, 2005 UT 80 at ¶10, 125 P.3d 906 (quoting Beach, 726 P.2d at 415). Ms. Williams was not dependent on the club or its members for her care or safety. It is not alleged that the club assumed an in loco parentis or other custodial role that assumed responsibility for Ms. Williams' safety. Ms. Williams was not deprived of her normal opportunities for self-protection, either. The Complaint alleges that she arrived at the park and lay down to rest in a location of her choice.

C. The special relationship requirement is founded in sound public policy and common sense

The imposition of a duty is "an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." Beach, 726 P.2d at 418 (quoting William Prosser, *Law of Torts* § 333 (3d ed.1964)); see also Webb,

2005 UT 80, ¶9, 125 P.3d 906; Drysdale, 869 P.2d at 2. "If the duty is realistically incapable of performance, or if it is fundamentally at odds with the nature of the parties' relationship, Utah courts should be loath to term that relationship special and to impose a resulting duty, for it is meaningless to speak of special relationships and duties in the abstract." Beach, 726 P.2d at 418 (internal citations and quotations omitted). The court should consider the practical impact of finding a special relationship. See id.; see also Drysdale, 869 P.2d at 2.

In analyzing whether a special relationship exists in light of this precedent, Utah courts have undertaken an approach that is both practical and policy-based. In the end, determining whether an individual has an affirmative duty to protect another from a third party requires careful consideration of the consequences for society as a whole. See id.

If a duty of care is imposed on the Individual Defendants in the instant case, individuals in other cases who are unaware of an injury, and who are members of some type of organization, group, or association with the tortfeasor, would become subject to liability for the torts committed by the tortfeasor. For example, a member of a church congregation would be liable for the torts committed by another member of the congregation; a member of the Utah State Bar would be liable for the torts of another member; a member of a tennis, golf, soccer, or other sports club would be liable for torts committed by another member of the club; a member of a Chamber of Commerce would be liable for torts committed by another member; a member of an athletics league or conference would be liable for the torts committed by another member; a member of a university fraternity or sorority would be liable

for the tortious conduct of another fraternity or sorority member; a member of a university alumni association could be liable for the torts committed by another member; a member of a homeowners association would be liable for the torts committed by another member; a member of a service organization such as the Elks, Freemasons, Kiwanis, or Rotarians, would be liable for the torts of another member. As is evident from this extensive (and obviously non-exhaustive) list, if a duty of care is imposed on the Individual defendants in this case, the list of potential defendants that could be liable for the torts committed by another member of an unincorporated association of which that person is also a member is so extensive that it could include individuals who are unaware of the injury, but who are simply co-members of some type of organization, group, or association with the tortfeasor. Indeed, the potential defendants may not even know the tortfeasor. The law should not permit such results.

The law must require something more than membership in an unincorporated association for one member of the group to be liable for torts committed by another. This is especially the case in Utah where negligence is based upon fault. See Utah Code Ann. §§ 78-27-37 to -43 (2007). The mere fact that individuals are members of an unincorporated association, in this case a club, should not constitute grounds for imposing tort liability on all members of the club for the tortious act of one member. The liability of the club members should be evaluated with respect to each individual's specific conduct. To do otherwise would be contrary to Utah's concept of fault-based negligence. See generally Utah Code

Ann. §§ 78- 27-37 to –43 (2007).

D. Other Utah cases where relationships actually existed between the parties support the conclusion that no special relationship exists between a member of a club and a third party who is injured by another member of the club

Utah law has held that no special relationship exists in circumstances involving a closer relationship than the tenuous relationship in the instant case between club members and Ms. Williams. Imposing a duty of care in the instant case would run contrary to this precedent.

Drysdale v. Rogers is instructive regarding the relevant relationship, explaining that the pertinent relationship is between the named defendant (the Individual Defendants in the instant case), and the injured party (Ms. Williams). The relationship between the tortfeasor (Mr. Wiggins) and any other defendant (all of the club members) is inconsequential. In Drysdale v. Rogers, 869 P.2d 1 (Utah App.1994), a boy was injured due to the negligence of an adult driver of an automobile. Id. at 1-2. The injured boy's mother sued the parents of the driver. Id. at 2. The court held that no duty of care was owed by the parents to the injured boy because there was no special relationship between the driver's parents and the injured boy. Id. at 2-3. Clearly a special relationship existed between the driver and his parents as members of the same family. However, because no special relationship existed between the injured party and the defendants, no duty of care was owed. Id. at 2-3. In reaching this decision, the court discussed both policy and practical aspects of imposing a duty of care on parents to protect others from torts committed by their adult children, stating

that imposing such a duty "would lead to an unprecedented imposition of duty." Id. at 3.

Beach v. University of Utah and Webb v. University of Utah are instructive regarding the limited scope of people to which a duty of care should extend. In Beach v. University of Utah, 726 P.2d 413 (Utah 1986), neither the university or various university officials owed a duty to a student who was injured on a university-sponsored event because no special relationship existed. Id. at 414. The university sponsored the field trip that was organized by a biology professor. Beach asserted that a special relationship existed between her and the professor, university, and other university officials. Id. The court disagreed. Id. at 416. The relationship of student to teacher was not enough to give rise to a duty of care. Id. The professor "had no duty to walk each student to his or her tent or sleeping bag on the night of the accident, a measure that presumably would have prevented the accident." Id. In Webb v. University of Utah, 2005 UT 80, 125 P.3d 906, the university again owed no duty of care to a student, this time even when the instructor required the class to enter a dangerous area of ice and snow on a required school field trip. Id. at ¶¶ 1-4, 16. No duty of care was owed because the university did "not stand in loco parentis to its [students] and it does not have a 'special custodial duty' to its [students]," id. at ¶19, and because the injured student did not relinquish a sufficient amount of personal autonomy to the professor. Id. at ¶¶24-25.

Applying these cases to the instant case, no special relationship exists between the Individual Defendants and Ms. Williams. Indeed, there is no relationship between Ms. Williams and the Individual Defendants, much less a significant or special one; they simply

attended the same function or event. The Individual Defendants and tortfeasor Ralph Wiggins are members of the same club, but this relationship is inconsequential. See Drysdale, 869 P.2d at 2-3. The Individual Defendants also did not stand in loco parentis to Ms. Williams, control her autonomy, or owe her any type of special custodial duty. Ms. Williams was not deprived of any normal opportunities of self-protection. She was not deprived of any personal autonomy. She chose to lay down in the park. As a result, no special relationship exists between the Individual Defendants and the Plaintiffs.

E. Case law from other jurisdictions supports dismissal of the Individual Defendants due to the lack of a duty of care

1. Colorado authority provides guidance to be followed

This court should follow authority from the Colorado Supreme Court, Thomas v. Dunne, 279 P.2d 427 (Colo. 1955). Like the instant case, Thomas v. Dunne involved a complaint against members of "an unincorporated association" or club. Id. at 428. The plaintiff was injured at an event organized and conducted by the association – an initiation ceremony. Id. Instead of suing the persons who actively participated in committing the tort, the plaintiff in Thomas attempted to sue the members of the club. Like the instant case, the plaintiff in Thomas claimed that the members of the unincorporated association owed him a duty of care by virtue of their membership in the club and by virtue of their conducting and overseeing the event. Id. at 428-30.

The individual club member defendants were properly dismissed as a matter of law; the district court's failure to grant their motion to dismiss was reversed on appeal. Id. at 429-

31. The Colorado Supreme Court, sitting en banc, held that any judgment "entered against the persons named as defendants was void." Id. at 430. The club members were properly dismissed as a matter of law because "there [was] no allegation in the complaint that any of the named defendants . . . committed the tort of which complaint is made." Id. "The only allegation appearing in the complaint, which it is claimed is sufficient to fix liability upon every member of the organization, is the charge that the named defendants were members of the [club], or presently held, or at some time in the past held, an office in the association." Id. The Colorado Supreme court explained that in order for liability to be imposed against an individual member of an unincorporated association, "that person . . . must be actively connected with the commission of the negligent act, both by allegation on his part and proof thereof upon the trial." Id. at 432. Dismissal was proper as to the individual club members because "[n]o such allegation can be found in the complaint in the case at bar." Id. at 432.

This court should follow Thomas, dismissing all defendants other than Ralph Wiggins. There is no allegation in the Amended Complaint that any individual other than Mr. Wiggins actively participated in the commission of the tort – driving his truck over Ms. Williams. (Am. Compl. ¶¶11-12.) Plaintiffs' Amended Complaint alleges that Ralph Wiggins was the only individual actively connected with the commission of the negligent act. Plaintiff alleges that the Individual Defendants should somehow be directly liable "as members of [the club]," for failing "to observe . . . and to warn [Ms. Williams] of [Mr. Wiggins'] moving motor vehicle" (Am. Compl. at ¶27), or that the Individual Defendants should somehow be

vicariously liable for Mr. Wiggins' negligent conduct "by virtue of their status as members of [the club]" and as "recipients of the privileges and benefits of membership [in the club]." (Am. Compl. ¶30.) The individual club members should be dismissed as a matter of law for the same reasons set forth in Thomas. No duty was owed by members of the club to protect or warn Ms. Williams by virtue of their membership in the club or by virtue of the fact that the club organized and conducted a steak fry. The only individual who is alleged to have actively participated in committing the tort against Ms. Williams is Ralph Wiggins. Applying Thomas, the Individual Defendants who are alleged to be liable by virtue of club membership and the fact that they are members of a club that organized a steak fry must be dismissed. See Thomas, 279 P.2d at 430.

2. Other jurisdictions require active participation in the commission of the tort for a club member to be liable

Other jurisdictions agree that a member of a club or unincorporated association is not liable to an individual injured by another member of the club. Rather, to be liable in tort, a club member must actively participate in the commission of the tort. Even the cases cited by Plaintiff so hold. Because the Amended Complaint alleges that only Ralph Wiggins actively participated in the commission of the tort, and there are no allegations that the Individual Defendants actively participated in the commission of the tort, these cases support dismissal.

The district court discussed Orser v. George, 252 Cal. App. 2d 660 (Cal. Ct. App. 1967), at the hearing. The Orser court held that a member of an unincorporated association

is not responsible for the tortious act of another member unless the member actively participates in commission of the tort; membership does not make one club member liable for the torts of another. Id. at 670-71. Byron Orser was shot accidentally by one of two defendants, Vierra or Jacobsen. Id. at 663-64. Both were members of an unincorporated association – a duck club. Id. at 665. The plaintiffs asked the court to impose liability against the other members of the club. The court refused and held that the other members of the club could not be liable. Id. at 670-71. The court stated, "mere membership does not make all members liable for unlawful acts of other members without their participation, knowledge or approval." Id. at 670-71. Applied to the instant case, Orser supports dismissal. There is no allegation that the Individual Defendants participated in the commission of the tort. There is no allegation that any one of them knew that Ralph Wiggins was driving his truck over Ms. Williams, or approved it. To the contrary, the Amended Complaint clearly alleges that the only individual who actively participated in the commission of the tort was Ralph Wiggins. Based upon these allegations, the complaint was properly dismissed.[3]

In Guyton v. Howard, 525 So.2d 948, 956 (Fla. Ct. App. 1988), a case relied on by Plaintiffs, an individual was injured during the initiation ceremony of a fraternal

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[3] This court could even affirm on other grounds, holding that based upon the pleadings alone, because Ralph Wiggins ran over Ms. Williams in his truck, the Individual Defendants were not the proximate cause of the accident as a matter of law. See, e.g., Hall v. Booth, 423 So.2d 184 (Ala. 1982) (holding that members of unincorporated hunting club were not liable for tort committed by other member of club because, as a matter of law, they were not the proximate cause of the injury).

organization, "an unincorporated association affiliated with [a] national organization." Id. at 949. Named defendants included individual members of the association. The complaint even included, like the complaint in the instant case, an allegation that the unincorporated association was "a corporation doing business in Florida." Id. at 950. The jury instructions were challenged on appeal. The appellants made the same argument that the Plaintiffs make in the instant case, that participation in the "activities of the day" or event at which the tort occurred should have been sufficient to allege a duty of care and avoid a directed verdict. Id. at 952. After discussing authority from various jurisdictions, the court explained that "[t]he individual members of an unincorporated association are personally liable for tortious acts which they individually commit or participate in, or which they authorize, assent to, or ratify." Id. at 956. The court stated as follows: "the liability of a member of an unincorporated fraternal or social organization is based upon his direct, active negligence . . . . It is not a liability imputed to the member based solely on his relationship to an active tort-feasor. It is not 'vicarious liability.'" Applying Guyton to the instant case, the Individual Defendants owe no duty of care to Ms. Williams because it is not alleged that they "individually commit[ted] or participate[d] in" the tort. Rather, Ralph Wiggins is alleged to be the only actual tortfeasor. Additionally, there is no allegation that any Individual Defendant authorized, assented to, or ratified Mr. Wiggins' conduct.

Plaintiffs also cite Libby v. Perry, 311 A.2d 527, 534 (Me. 1973), a case which also supports the active participation requirement. In Libby, a plaintiff was injured by a condition

on the land; he "slipped on an icy rut [in front of the building where a dance was held] and fell." Id. at 529. The plaintiff alleged that the sponsor of the dance should have ensured that the entrance and exit was reasonably safe. Id. The Maine Supreme Court held that the members of the planning committee could be liable because they "had assumed control of the premises" and "the defect which caused the Plaintiff's fall and consequential injuries was shown to have existed for a sufficient period of time to have permitted [remedying the] dangerous condition caused by the frozen ruts." Id. at 534. At the same time, the court explained as follows: "[I]ndividual members of [an] association do not, merely by virtue of their membership in [the] association, subject themselves to liability for injuries [caused by] the negligent conduct of their associates or their agents in the running of a social event sponsored by the association." Id. Applying Libby to the instant case, the Individual Defendants did not actively participate in anything that caused Ms. Williams' injury. They attended the same event. Moreover, Ms. Williams was not injured by any dangerous condition on the land that the club organizers could have remedied. Rather, Ms. Williams was injured by the conduct of Ralph Williams. Accordingly, Libby does not impose liability on any club member for failure to fix a dangerous condition on the land because because no condition on the land caused any injury. See, e.g., Smith v. Bank of Utah, 2007 UT App 89, ¶9, 157 P.3d 817 (discussing the determinative difference between an injury caused by a condition on the land and an injury caused by an individual). Moreover, the language that "individual members of [an] association do not, merely by virtue of their membership in [the]

association, subject themselves to liability for injuries [caused by] the negligent conduct of their associates or their agents in the running of a social event sponsored by the association," actually supports dismissal of the Individual Defendants. The Individual Defendants are not liable for Ralph Wiggins' negligence merely because they are members of the club that sponsored the event.

Plaintiff also cites Rudolph v. Arizona B.A.S.S. Federation, 898 P.2d 1000 (Ariz. Ct. App. 1995). Rudolph, however, is inapplicable because it sets forth facts describing an affirmative act, as opposed to an omission or failure to act. In Rudolph, a club sponsored and organized a fishing tournament at an Arizona lake. Id. at 1001. To do so, the club obtained a permit from the U.S. Forest Service which required the club to ensure the safety of everyone on the lake during the tournament – participants and bystanders. The club agreed to "assure that all participants operat[ed] boats in a safe and reasonable manner without endangering the peace and safety of other persons" at the lake. Id. The club did nothing to enforce this contractual obligation it assumed other than to tell participants to be courteous. Id. Contrary to the agreement to assure safety of all on the lake, the tournament required a weigh in at a particular time to avoid disqualification, which resulted in the boat traffic that caused the accident. Id. Describing what was in essence an affirmative act instead of an omission, the court stated, "[s]imilar to drivers on the roadways, a user of a lake owes a duty to use due care to avoid injuring all other users of the lake." Id. at 1003. Seemingly mixing the issue of breach with duty, the court then noted that whether the tournament organizers

should have done more to ensure safety was a question for the jury. Id. The instant case differs because the Amended Complaint makes no allegations that the club assumed any obligations by contract towards persons at the steak fry. There is no allegation that the club agreed with any governmental agency to ensure that all people at the steak fry acted appropriately so as to not endanger others at the park. Plaintiffs do not allege that something about the organization of the steak fry constituted an affirmative act to create any dangers – such as the weigh in time requirement. Rather, Plaintiffs simply allege that the people at the steak fry should have warned her of Ralph Wiggins' truck, and that they failed to exercise a reasonable lookout "as persons conducting, managing and overseeing the steak fry." In short, Rudolph is inapplicable because it involved an affirmative act, and the instant case involves only allegations of omissions or failures to act.

Indeed, a subsequent decision of the Arizona Court of Appeals explains that Rudolph is a negligence by affirmative act case, as opposed to negligence by omission. In Colette v. Tolleson Unified School Dist., 54 P.3d 828, 831-32 (Ariz. Ct. Apps. 2002), the court explained that Rudolph had been misconstrued. The court stated: "[w]hen one motorist negligently injures another on a public highway, liability is obviously not dependent upon whether they know each other. Their relationship begins with their joint status as motorists, which places them within the foreseeable risk of negligent driving by other motorists. The general duty of reasonable care arises from this relationship and becomes fixed when it is breached and causes damage. The result is a direct relationship between tortfeasor and

injured victim. Rudolph applied these concepts to find that the organizer of a fishing tournament had a duty to exercise reasonable care in designing and conducting the tournament so as not to injure other users of the lake." Id. (citations omitted) In other words, Rudolph applied a duty as a result of a direct relationship similar to that of two motorists. In the instant case, however, the only allegations are that the people at the steak fry failed to look for and warn Ms. Williams of dangers.

Finally, in a case not cited by Plaintiff, Juhl v. Airington, 936 S.W.2d 640 (Tex. 1996), the Texas Supreme Court held that the organizer of a group of protestors or unincorporated association was not liable for a tort caused by the conduct of another member of the group. Id. at 642-43. The court stated as follows: "[L]iability of members of a group should be analyzed in terms of the specific actions undertaken, authorized, or ratified by those members. Therefore, regardless of whether there was an unincorporated association here, we reject the [position] that the existence of such an association might alone form the basis for imposing tort liability on all members for the acts of some." Id. at 643.

In the instant case, the district court discussed the active participation requirement at the hearing. Plaintiffs counsel suggested to the district court that participation in planning the event at which the injury occurred should be enough to impose a special relationship. The district court asked whether, for an individual member of the club to be liable for a tort committed by another member, the individual has "to somehow be involved in the act which resulted in the injury." (Tr. 13:6-12.) In response, Plaintiff's counsel asserted that it was

sufficient to impose liability on all the members of the club, individually, because the club was involved in planning and overseeing the event. (Tr. 13:13 to 14:20, 17:14 to 19:6.) The district court then proceeded to draw the distinction between participation in the event, and participation in the actual tort, stating, inter alia: "But don't you agree, [that] they have to do something that is connected with the tort, that is running over your client[?] It isn't enough, is it, to just say well, they all brought steaks, they all were involved in setting up the steak fry? There's got to be more than that, doesn't there?" (Tr. at 20:1-20, 21:8 to 22:16.)

As outlined above, the active participation doctrine does require more than participation in the planning of the event; it requires active participation in the commission of the tort. See Thomas v. Dunne, 279 P.2d 427 (Colo. 1955); Orser v. George, 252 Cal. App. 2d 660 (Cal. Ct. App. 1967); Guyton v. Howard, 525 So.2d 948, 956 (Fla. Ct. App. 1988); Libby v. Perry, 311 A.2d 527, 534 (Me. 1973); Juhl v. Airington, 936 S.W.2d 640 (Tex. 1996). There is no allegation that any Individual Defendant did anything other than fail to warn Ms. Williams. There is no allegation that the Individual Defendants actively participated in the tort that injured Ms. Williams; rather it is alleged that Ralph Wiggins was the only active participant by running over Ms. Williams in his truck. There is no allegation that any Individual Defendant acted in concert with, or ratified, the negligent conduct of Ralph Wiggins. Because no Individual Defendant is alleged to have actively participated in the commission of the tort – only Ralph Wiggins did – the Individual Defendants were properly dismissed as owing no duty of care.

At oral argument Plaintiffs alleged that they had pleaded "vicarious liability of a for-profit joint venture or partnership . . . while acting within the scope of that partnership." (Tr. 27:2-9.) Plaintiffs claimed that because they alleged that the club was an unincorporated association doing business in Utah in paragraph 2 of the Complaint, that "[a] reasonable inference from there is for profit." (Tr at 31:24 to 32:4.) There is no allegation that the Stags Car Club is a partnership or a joint venture. These allegations of for profit were never alleged in the original complaint or the amended complaint and are simply an attempt to avoid dismissal.

F. No special relationship exists between the Plaintiffs and the Individual Defendants

Plaintiffs simply claim that a duty of care is owed by the Individual Defendants by attending the same event with Ms. Williams and failing to warn her of Mr. Wiggins' truck (Am. Compl. ¶ 27), and "by virtue of their membership" in the Stags Car Club. (Id. at ¶30.) Applying Utah law on the special relationship doctrine, no special relationship exists between the Individual Defendants and the plaintiffs. Because no special relationship exists, no duty of care is owed by the Individual Defendants to the Plaintiffs. Applying similar cases from other jurisdictions, no special relationship exists. Only Ralph Wiggins actively participated in the commission of the tort, and therefore he is the only individual who owes a duty of care.

The Individual Defendants are members of a car club. The club hosted a "steak fry" or picnic at a public park. Ms. Williams arrived at the steak fry and lay down to rest. She

was run over by Ralph Wiggins. The Plaintiffs allege that the Individual Defendants – the members of the club – failed to act to protect her. Plaintiffs claim that the Individual Defendants failed to "exercise a reasonable lookout and reasonable care for [Ms. Williams]," and that they failed to "warn [Ms. Williams] of the presence of moving motor vehicles [i.e. Ralph Wiggins' truck]." (R. 096 at ¶27.) At the same time, the Individual Defendants are accused of vicarious liability "[b]y virtue of their status as members of the unincorporated association . . . and as recipients of the privileges and benefits of membership [in the club." (Am. Compl. at 30.)

The Individual Defendants have been named as defendants "by virtue of their membership in the club," with no consideration given to whether they were even present at the steak fry. Additionally, it has not been alleged that the Individual Defendants assumed responsibility for Ms. Williams, nor was it alleged that Ms. Williams was deprived of her normal opportunities for self-protection. Ms. Williams was not dependent on the club or its members for her care or safety. It is not alleged that the club assumed an in loco parentis or other custodial role that assumed responsibility for Ms. Williams' safety. The Complaint alleges that she arrived at the park and lay down to rest in a location of her choice. She was not deprived of her normal opportunities for self-protection. Based upon these allegations, there is no special relationship between the Individual Defendants and the Plaintiffs.

II. Plaintiffs' unpreserved and unsupported request for leave to file a second amended complaint

A district court's denial of a motion to amend the pleadings is reviewed for an abuse of discretion. See, e.g., Holmes Dev. Co. v. Cook, 2002 UT 38, ¶56, 48 P.3d 895. The denial of the request for leave to file a second amended complaint was neither preserved for appeal, nor was it adequately particular as required by Utah law.

A. Failure to preserve the issue for appeal

Plaintiffs failed to preserve for appeal their request for leave to amend the complaint in the district court. This is because the issue was not raised to a level of consciousness to the district court. No papers were filed seeking leave to amend. No legal authority was cited in support. No proposed amended complaint was submitted for the district court to consider. Plaintiffs claim to have preserved the issue in opposing the motion to dismiss. (Br. of Appellants at 3-4, citing R. 614-26.) Review of the record reveals that this claim of preservation is simply not true.

The "mere mention" of an issue without supporting evidence or relevant legal authority does not preserve that issue for appeal. LeBaron & Assocs., Inc. v. Rebel Enterprises, Inc., 823 P.2d 479, 483 (Utah App.1991). An oblique reference to an issue, especially without an objection to the trial court's failure to rule on the issue, does not put that issue properly before the court. Id. (discussing James v. Preston, 746 P.2d 799, 801-02 (Utah App.1987)). "'For an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that the trial judge can consider it.'" Id. (quoting James, 746 P.2d at 802). Failure to raise and argue an issue in the district court denies the

district court the opportunity to rule on the issue's merits. See State v. Brown, 856 P.2d 358, 360 Utah Ct. App. 1993) (quoting LeBaron, 823 P.2d at 483 n.6).

Plaintiffs' request for leave to file an amended complaint was not preserved for appeal; it was an afterthought. Plaintiffs' request for leave to amend was not raised to any level of consciousness in the district court. Plaintiffs' counsel made the brief request in the last seconds of oral argument. Found in only 6 lines of oral argument transcript, counsel mentioned that "plaintiffs in the alternative request the court to grant leave to amend to make [their] allegations certain and clear." (Tr. 27:15-20.) Plaintiffs never filed a written motion for leave to file an amended complaint. Plaintiffs never referred to any legal authority in support of the request for leave to file an amended complaint. Rule 15 was not even mentioned. Additionally, even when proposed orders were exchanged, no mention of the request for leave to amend was made by Plaintiffs. Plaintiffs' proposed orders do not even mention a ruling on the request for leave to amend. Indeed, Plaintiffs never sought a ruling on the supposed request for leave to amend after hearing. Under these circumstances, Plaintiffs' brief request for leave to file an amended complaint does not preserve that issue for appeal.

B. Failure to properly move the court for leave to amend: no motion, no legal authority, and no proposed amended complaint

Plaintiffs also failed to comply with the particular requirements of seeking leave to amend the complaint. Rule 15 of the Utah Rules of Civil Procedure governs motions to

amend pleadings. It states that "leave [to amend a pleading] shall be freely given when justice so requires." Utah R. Civ. P. 15(a) (2007). However, "[t]o properly move for leave to amend a complaint, a party must file a motion that shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Holmes Dev. L.L.C. v. Cook, 2002 UT 38, ¶57, 48 P.3d 895 (citations omitted). "Further, a motion for leave to amend must be accompanied by a memorandum of points and authorities in support, and by a proposed amended complaint." Id. (citations omitted). These requirements ensure that the district court is adequately informed and can rule on the motion. Id. at ¶ 58.

Request for leave to amend was properly denied in Holmes because no actual motion was filed. The same result should be reached in the instant case. In the instant case, Plaintiffs' request for leave to amend was merely a request in passing. No motion was filed. No memorandum of points and authorities was filed in support. No proposed amended complaint was submitted for the district court to consider. Rule 15 was not even mentioned at the hearing, much less any other legal authority. This is insufficient. Such a lacking request does not allow the trial court to "determine whether the motion should be granted and whether justice so requires the amendment." Holmes, 2002 UT 38 at ¶58.[4] Holmes concluded that the movant failed to meet the particularity requirements when it merely cited

[4] Even if Plaintiffs had made a motion, cited legal authority, and submitted a proposed amended complaint, the amendment could not have been properly granted. The brief "reasoning" offered by Plaintiffs was "to make [their] allegations certain and clear." (Tr. 27:15-20.) This does not constitute adequate grounds to grant leave to amend a complaint.

rule 15(a) and stated that leave to amend should be freely given. Id. at ¶59 The Plaintiffs in the instant case did even less. Based upon Holmes, leave to amend cannot even be considered by this court, much less granted.

III. Rule 54(b) certification: certification is proper, and this court can always exercise its discretion to hear this matter as an interlocutory order pursuant to Utah Rule of Appellate Procedure 5

Plaintiffs complain that the matter was not properly certified pursuant to Rule 54(b) because they filed their notice of appeal before the district court entered its findings and rationale. Plaintiffs' arguments are inconsistent. Plaintiffs claim certification was not proper, but at the same time claim to appeal the granting of the motion to dismiss. This court should reject Plaintiffs' argument on this point. The matter was certified as a final judgment, and the district court did enter findings and rationale that permit this court to determine whether certification is proper.

Even if this court concludes that the matter was not properly certified because the notice of appeal was filed before the certification findings and rationale were entered, the court should exercise its discretion under rule 5(a) of the Utah Rules of Appellate Procedure and hear and decide the appeal. Remanding the matter so that the court may enter the same certification order a second time will simply result in a waste of judicial resources and result in an injustice to the Individual Defendants who desire finality. Moreover, Plaintiffs waived their argument that certification was improper because they failed to file an opposition memorandum to the motion to have the matter certified as final, and because they failed to

provide the district court with any reason why the matter should not be certified as final.

A. Plaintiffs' arguments are inconsistent

The position taken by Plaintiffs that the district court erred in granting 54(b) certification should be withdrawn as it was by Plaintiffs' counsel in Dimick v. OHC Liquidation Trust, 2007 UT App 73, ¶5, 157 P.3d 347 (noting plaintiff's withdrawal of argument challenging 54(b) certification where plaintiff sought reversal of dismissal of defendant on appeal). This is because Plaintiffs' position regarding certification is inconsistent with its' desire to appeal the dismissal of the Individual Defendants. Plaintiffs apparently fail to recognize that they would not be able to appeal the dismissal of the Individual Defendants in the absence of the Rule 54(b) certification. On one hand Plaintiffs seek to appeal the dismissal of the Individual Defendants; but on the other hand they argue that certification was improper, even though certification provides Plaintiffs with the ability to appeal the dismissal order in the first place. (See Br. of Appellant, issues 1 and 4, and Notice of Appeal, R. 878-81.) It is only because the Individual Defendants requested the district court certify the matter as final that the Plaintiffs can even pursue the appeal. Remanding the matter will simply result in a waste of judicial resources and result in further delay in obtaining finality for the Individual Defendants. It makes little sense to ask that the matter be remanded so that the court may enter the same certification order a second time.

B. Rule 54(b) certification is proper to obtain finality for the Individual Defendants

The fact of the matter is that the district court did certify the dismissal order as final

pursuant to Rule 54(b) and did enter findings and rationale explaining why certification was proper. When certifying an order as final, district courts should enter "findings" that provide a "brief explanation" as to why the matter is properly certified. Bennion v. Pennzoil Co., 826 P.2d 137, 139. This is "so that [the appellate court] may render an informed decision on [the question of certification]." Id. Utah's district courts have been instructed by the appellate courts to provide this brief explanation so that the issue of certification may be reviewed if necessary. Id.

This was done in the instant case. The district court provided findings and rationale explaining why certification was proper. As a result, the question of whether the matter was properly certified can be reviewed by this Court. There is no prejudice to Plaintiffs by having the matter reviewed. Indeed, Plaintiffs want the matter to be reviewed. The fact that Plaintiffs may not appreciate the inconsistent nature of their position should not deprive the Individual Defendants of finality.

Certification was proper because all the requirements under Utah law are satisfied. Utah case law interpreting Rule 54 indicates that three requirements must be met for entry of a final judgment: (1) there must be multiple claims for relief or multiple parties; (2) the judgment or order must be an order that would be appealable but for the fact that the other claims or parties remain in the action; and (3) the trial court, in its discretion, must make a determination that there is no just reason for delay for entry of the final judgment. Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1101; Pate v. Marathon Steel Co., 692

P.2d 765, 767 (Utah 1984); see also 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2656 at 47-48 (1983).

All three requirements are satisfied here. First, there are multiple parties to the action and all of the individual club members named as defendants have been dismissed (except for one – the driver who ran over the plaintiff). Two parties remain: Stags Car Club, as an entity, and Ralph Wiggins.

Second, the order dismissing these Individual Defendants would be appealable but for the fact that the entity Stags Car Club, and Ralph Wiggins, remain as parties. The order wholly disposes of the Individual Defendants, and final judgment would be entered in favor of them but for the fact that the club and Ralph Wiggins remain. There is no factual overlap between the certified claims and remaining claims. This is because the Individual Defendants filed motions to dismiss. Indeed, no facts were relied upon in deciding the motion to dismiss. Rather, the motion to dismiss was granted, and dismissal is entirely appropriate without considering matters outside the Amended Complaint. The allegations made against the individual club members were different from the allegations made against the club as an entity and different from the allegations against Ralph Wiggins. Accordingly, the claims against the Individual Defendants were dismissed. Whether or not the individual club members owed duties of care in their individual capacities by virtue of their membership in the club is different from, and requires no factual overlap with, whether the club owes a duty as an entity, and whether Ralph Wiggins owes a duty as the alleged active tortfeasor

who injured the Plaintiff with his truck.

Third, there is no just reason to delay entry of a final judgment as to the individual defendants including Greg Warg and B.J. Burkdoll. A final judgment as to the Individual Defendants promotes efficiency and serves the ends of justice. It permits final resolution of the dispute between the Individual Defendants and the Plaintiffs; if final judgment were not entered as to the Individual Defendants at this time, they would not obtain a final resolution until Plaintiffs' dispute with Ralph Wiggins is resolved, unnecessarily prolonging their involvement. The appellate litigation involving the Individual Defendants should be resolved now, so as to not prolong their involvement in this matter. Remanding the matter will simply result in a waste of judicial resources and result in further unnecessary delay.

C. This court can exercise its discretion to hear this matter as an interlocutory order Utah Rule of Appellate Procedure 5

The instant case is certainly worthy of certification. The district court entered findings and reasons why the matter should be certified as final. If this court concludes, for whatever reason, that the 54(b) certification was improper, this court should exercise its discretion pursuant to Rule 5(a) of the Utah Rules of Appellate Procedure and hear the appeal. See, e.g, Hawkins ex rel. Hawkins v. Peart, 2001 UT 94, ¶3 n.2, 37 P.3d 1062 (noting that even though 54(b) certification was improper, the court "nonetheless agreed to exercise its discretion under rule 5(a) of the Utah Rules of Appellate Procedure," to hear and decide the appeal); Field v. Boyer, 952 P.2d 1078, 1079 (Utah 1998). Remanding the matter for the district court to enter the same certification order a second time will simply result in a waste

of judicial resources and result in further unnecessary delay.

D. Plaintiffs waived any objection to certification by failing to offer any reasons why certification should not be granted

Plaintiffs complain that the findings and rationale in support of certification were entered after the order of dismissal was signed and after the notice of appeal was filed. However, it is Plaintiffs' conduct that created this situation. Moreover, Plaintiffs failed to provide any memorandum in opposition or reasoning against certification, and thereby waived any right to challenge it.

After the court ruled that it was going to grant the Individual Defendants' motion to dismiss, proposed orders were exchanged by the parties. No agreement was reached on an order. As a result, Plaintiffs sent a letter to the court on November 20, 2006, objecting to a proposed order that included certification of the matter as a final judgment pursuant to Rule 54(b). On November 30, 2006, the district court signed a proposed order dismissing the Individual Defendants and certifying the matter as final pursuant to Rule 54(b).

However, before the November 30 order of dismissal was signed, Individual Defendants filed a motion to have findings and rationale entered in support of the Rule 54(b) certification. This motion was filed on November 28, 2006, two days before the order dismissing the Individual Defendants was signed and entered by the district court. No memorandum in opposition to the motion for certification was filed by Plaintiffs.

Instead of filing a memorandum in opposition, Plaintiffs filed a notice of objection.

However, the notice of objection offered no reasons why the matter should not be certified as final pursuant to Rule 54(b). Rather, Plaintiffs stated, "because the Court has previously entered its Order Granting Defendants' Motion to Dismiss and Final Judgment Pursuant to Rule 54(b) on November 30, 2006, Plaintiffs assume that Defendants' motion is moot and will not be addressed by the Court." Additionally, instead of waiting for an order on the motion for certification and instead of waiting to see whether the district court would accept or reject the proposed findings and rationale, Plaintiffs filed their notice of appeal on December 29, 2006. Subsequently, the district court entered its findings and rationale explaining why certification was proper pursuant to Rule 54(b).

Plaintiffs waived their argument that certification was improper by failing to file an opposition memorandum to the motion to have the matter certified as final, and they waived their argument that certification was improper by failing to provide the district court with any reason why the matter should not be certified as final. Plaintiffs disagreed with the 54(b) certification in their notices, but they never presented any reason why the matter should not be certified as final. Plaintiffs simply stated that "because the Court has previously entered its Order Granting Defendants' Motion to Dismiss and Final Judgment Pursuant to Rule 54(b) on November 30, 2006, Plaintiffs assume that Defendants' motion is moot and will not be addressed by the Court."

CONCLUSION

The Individual Defendants were properly dismissed because they owed no duty of

care to protect Ms. Williams from Mr. Wiggins. Plaintiffs allege negligence by omission or failure to act. Utah law directs that before a duty of care may be imposed based upon an omission or failure to act, a special relationship must exist. There is no special relationship between Ms. Williams and the Individual Defendants.

Case law from other jurisdictions also supports dismissal of the Individual Defendants. See, e.g., Thomas v. Dunne, 279 P.2d 427 (Colo. 1955). Pursuant to the active participation requirement outlined in case law from other jurisdictions, Ralph Wiggins is the only proper defendant because he is the only one who actively participated in the commission of the tort. Plaintiffs have their remedy against Ralph Wiggins and the assets of the club. Their attempt to overreach and impose a duty on each of the Individual members of the club, in their individual capacities, should be rejected.

Plaintiff's request for leave to file a second amended complaint must also be rejected. This is because (1) Plaintiffs failed to preserve their request to file a second amended complaint, and (2) Plaintiffs did not meet the requirements for seeking leave to amend a pleading.

Finally, the district court also properly certified the matter pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, even though the findings and rationale were entered after the notice of appeal was filed. The purpose of the rule was satisfied because this Court has received findings and rationale that permit this court to determine whether certification is proper. Regardless, this court can exercise its discretion to hear this matter as an

interlocutory order pursuant to Utah Rule of Appellate Procedure 5. Remanding the matter for the district court to enter the same certification order a second time will simply result in a waste of judicial resources and result in further unnecessary delay.

All Individual Defendants respectfully request that the order dismissing them from the case be affirmed.

DATED this 22 day of January 2008.

RICHARDS, BRANDT, MILLER & NELSON

Gary L. Johnson
Michael K. Woolley
Attorneys for Defendant Greg Warg and BJ Burkdoll, and on behalf of All Individual Defendants 1-34

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEES ALL INDIVIDUAL DEFENDANTS 1-34, was mailed, first-class, postage prepaid, on this 22 day of January, 2008, to the following:

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Tab A

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IN THE SECOND JUDICIAL DISTRICT COURT
FOR WEBER COUNTY, STATE OF UTAH

SHARON WILLIAMS and LYNN WILLIAMS,

Plaintiffs,

vs.

STAGS CAR CLUB, a Voluntary Unincorporated Association; RALPH S. WIGGINS, and JOHN DOE 1: DENNIS BENCH; JOHN DOE 2: BRENT BODILY; JOHN DOE 3: ADAM CHRISTOFFERSON; JOHN DOE 4: CRAIG CHRISTOFFERSON; JOHN DOE 5: ROBERT EAMES; JOHN DOE 6: DEVIN ELLIS; JOHN DOE 7: MICKEY ELLIS; JOHN DOE 8: JERRY FULMER; JOHN DOE 9: JIMMY GERMER; JOHN DOE 10: DALE HAMMON; JOHN DOE 11: SCOTT HAMMON; JOHN DOE 12: MIKE HOWELL; JOHN DOE 13: BRENT KEYES; JOHN DOE 14: RAY PAGE; JOHN DOE 15: DON PALFREYMAN; JOHN DOE 16: DAVE SQUIRES; JOHN DOE 17: GREG WARG; JOHN DOE 18: MAC WHITE; JOHN DOE 19: BRUCE WOOLSEY; JOHN DOE 20: RYAN WOOLSEY; JOHN DOE 21: B.J. BURKDOLL; JOHN DOE 22: JIM BURKDOLL; JOHN DOE

AMENDED COMPLAINT AND JURY DEMAND

Civil No: 060900323

Judge: Ernest W. Jones

MAY - 9 2006

Amended complaint and jury demand
VD19008238
060900323 STAGS CAR CLUB

23: GARY MCDANIEL; JOHN DOE 24: JIM VOWLES; JOHN DOE 25: JOHN ELWESS; JOHN DOE 26: HAROLD LUNI: JOHN DOE 27: BILL NEW; JOHN DOE 28: SCOTT NEW; JOHN DOE: 29: JOHN NEW; JOHN DOE 30: BRAD NEW: JOHN DOE 31: JACK HARRIS: JOHN DOE 32: BRUNO PERRY; JOHN DOE 33: LYLE MASON: JOHN DOE 34: BOB LARIVEE, JR. AND JOHN DOES 35-100,

Defendants.

Plaintiffs, through counsel, for their causes of action, allege as follows:

PARTIES/JURISDICTION

1. Plaintiffs. ShaRon Williams and Lynn Williams are, and have been at all times relevant to this Complaint, residents of Riverdale City, Weber County, State of Utah, and have been lawfully married to one another.

2. On information and belief, Plaintiffs allege that Defendant Stags Car Club is and has been an unincorporated association doing business in the State of Utah, with its principal place of business in Roy, Utah, at all times relevant to this Complaint.

3. At the time of the events described in this Complaint, Defendant Ralph S. Wiggins was the secretary for Defendant Stags Car Club, and was a resident of Roy City, Weber County, State of Utah.

4. John Does 1-100 were members of Stags Car Club at all times relevant to this Complaint. The true identities of all such Doe Defendants are presently unknown, but will be provided by

way of substitution and/or amendment to this Complaint at such time as their identities are ascertained.

5. All acts and omissions giving rise to this Complaint occurred in Roy City, Weber County, State of Utah.

6. The amount in controversy in this matter exceeds the amount required for filing in the District Courts in the State of Utah.

FACTS AND CIRCUMSTANCES

7. On September 12, 2004, Defendant Stags Car Club was occupying and using George Whalen Park, 1900 West, Roy City, Weber County, State of Utah, and was hosting a "steak fry" for entertaining club members and their invitees.

8. On September 12, 2004, ShaRon Williams accompanied her husband, Lynn Williams, to the George Whalen Park for the "steak fry" hosted by Defendant Stags Car Club.

9. At the time and place of the events described herein, Plaintiff ShaRon Williams was an invitee of Defendant Stags Car Club and was thereby entitled to use the club's facilities and participate in the club's festivities.

10. Shortly after arriving at the park, ShaRon Williams lay down on the grass between two trees and fell asleep.

11. At about the same time, Defendant Ralph S. Wiggins got in his pick-up truck to drive to get a cooler for use by Defendant Stags Car Club in the course and scope of its event and for the benefit of its members, including Defendants John Does 1-100.

12. While still within the immediate area where Defendant Stags Car Club's event was taking place, Defendant Ralph S. Wiggins' truck ran over ShaRon Williams as she lay sleeping.

13. As the direct and proximate result of the combined negligence of Defendant Wiggins in the operation of his truck, Defendant Stags Car Club in organizing, conducting and maintaining an unsafe event, and Defendants John Does 1-100 in failing to provide a proper lookout for Defendant Wiggins and ShaRon Williams during the course of the event, Plaintiff ShaRon Williams suffered permanent and disabling injuries, and has suffered and will suffer special and general damages as more specifically described below.

FIRST CLAIM FOR RELIEF: NEGLIGENCE
(Ralph S. Wiggins)

14. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-13 above the same as if set forth herein in full.

15. As the operator of a motor vehicle at the time and place described, Defendant Ralph S. Wiggins owed a duty to ShaRon Williams to exercise reasonable care, including without limitation maintaining a proper lookout for persons in his path of travel, and keeping his vehicle under proper control at all times.

16. By his acts and omissions as described above, Defendant Ralph S. Wiggins breached his duty of care owed to ShaRon Williams.

17. As a direct and proximate cause of Defendant Ralph S. Wiggins' breach of duty of care, Plaintiff ShaRon Williams has suffered severe, permanent, physical and emotional injuries, and has suffered special and general damages, including but not limited to the following:

a. Medical expenses incurred in the past in an amount subject to proof at trial.

b. Medical expenses which the plaintiff can reasonably expect to incur in the future in an amount subject to proof at trial.

c. Loss of wages and earning capacity in the past and future in an amount subject to proof at trial.

d. Past and future pain, suffering, emotional distress and any loss of use amounting to a permanent disability and loss of employment in an amount subject to proof at trial.

e. Loss of enjoyment of life, past and future, in an amount subject to proof at trial.

f. Loss of household services in the past and in the future.

g. The costs of this action, and all such other and further relief as the Court deems equitable and proper.

SECOND CLAIM FOR RELIEF: DIRECT AND VICARIOUS LIABILITY
(Stags Car Club)

18. Plaintiffs incorporate by reference the allegations of paragraphs 1-17 above the same as if set forth herein in full.

19. At all times relevant hereto, Defendant Stags Car Club owed a duty to ShaRon Williams to organize and conduct its event in a reasonably safe manner, including without limitation segregating areas of vehicular and pedestrian use such that persons attending Defendant Stag Car Club's event and engaging in customary and foreseeable activities were not placed in a position of unreasonable danger.

20. By its acts and omissions as described above, Defendant Stags Car Club breached its duty owed to ShaRon Williams.

21. As a direct and proximate result of Defendant Stag Car Club's breach of duty. Plaintiff ShaRon Williams has suffered severe, permanent, physical and emotional injuries, and has suffered special and general damages, including but not limited to the following:

a. Medical expenses incurred in the past in an amount subject to proof at trial.

b. Medical expenses which the plaintiff can reasonably expect to incur in the future in an amount subject to proof at trial.

c. Loss of wages and earning capacity in the past and future in an amount subject to proof at trial.

d. Past and future pain, suffering, emotional distress and any loss of use amounting to a permanent disability and loss of employment in an amount subject to proof at trial.

e. Loss of enjoyment of life, past and future, in an amount subject to proof at trial.

f. Loss of household services in the past and in the future.

g. The costs of this action, and all such other and further relief as the Court deems equitable and proper.

22. At all relevant times hereto, Defendant Ralph S. Wiggins was a member and officer of Defendant Stags Car Club.

23. At the time and place described herein, Defendant Stags Car Club nominated and designated Ralph S. Wiggins to perform duties of the general kind and nature performed in the

scope of Defendant Stags Car Club's activities, including without limitation arranging, making provisions for, and conducting the event that was ongoing at the time of the events described in this Complaint.

24. At the time of the events described herein, Defendant Ralph S. Wiggins' was acting within the course and scope of his duties as a member and officer of Defendant Stags Car Club, his conduct was motivated, in whole or in part, by the purpose of serving the Stags Car Club interest, and his actions were for the benefit of and in furtherance of the interests of Defendant Stags Car Club.

25. For these reasons, Defendant Stags Car Club is vicariously liable for the negligence of Defendant Ralph S. Wiggins and for damages arising from Defendant Ralph S. Wiggins' negligence, in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF: DIRECT AND VICARIOUS LIABILITY
(John Does 1-100)

26. Plaintiffs incorporate by reference the allegations of paragraphs 1-25 the same as if set forth herein in full.

27. At the time and place described herein, Defendants John Does 1-100, as members of Defendant Stags Car Club and as persons conducting, managing and overseeing the Stags Car Club event then ongoing, owed a duty to ShaRon Williams to exercise a reasonable lookout and reasonable care for persons present at and participating in the event, including without limitation a duty to observe the movement of vehicles at the event and to warn persons of the presence of moving motor vehicles.

28. By their acts and omissions as described above, Defendants John Does 1-100 have breached their duties owed to ShaRon Williams.

29. As a direct and proximate result of Defendants John Does 1-100 breaches of duty, ShaRon Williams, Plaintiff ShaRon Williams has suffered severe, permanent, physical and emotional injuries, and has suffered special and general damages, including but not limited to the following:

a. Medical expenses incurred in the past in an amount subject to proof at trial.

b. Medical expenses which the plaintiff can reasonably expect to incur in the future in an amount subject to proof at trial.

c. Loss of wages and earning capacity in the past and future in an amount subject to proof at trial.

d. Past and future pain, suffering, emotional distress and any loss of use amounting to a permanent disability and loss of employment in an amount subject to proof at trial.

e. Loss of enjoyment of life, past and future, in an amount subject to proof at trial.

f. Loss of household services in the past and in the future.

g. The costs of this action, and all such other and further relief as the Court deems equitable and proper.

30. By virtue of their status as members of the unincorporated association, Defendant Stags Car Club, and as recipients of the privileges and benefits of membership of Defendant Stags Car Club, including without limitation the specific event described above, Defendants John Does 1-

100 are vicariously liable for the negligent acts of other members of the unincorporated association and for the injuries and damages that result there from.

FOURTH CLAIM FOR RELIEF: LOSS OF CONSORTIUM
(All Defendants)

31. Plaintiffs incorporate by reference the allegations of paragraphs 1-30 above the same as if set forth herein in full.

32. As the direct and proximate result of the injuries suffered by ShaRon Williams and caused by Defendants, and each of them. Lynn Williams has lost the care, comfort, society, companionship and household services of ShaRon Williams, and is entitled to an award of damages therefore.

WHEREFORE, Plaintiffs respectfully pray that the Court enter judgment in favor of Plaintiffs and against Defendants, and each of them, as follows:

A. For such special damages, including lost income and lost earning capacity, and medical care, rehabilitation and other expenses in amounts to proven at trial;

B. For such general damages, including pain, suffering, disability, impairment, emotional harm, distress, and diminution in quality of life in amounts to be proven at trial;

C. For such other relief as is appropriate and proper in the circumstances.

DATED this 2nd day of May 2006.

MORIARITY, BADARUDDIN & BOOKE, LLC

JACQUE M. RAMOS
Attorney for Plaintiffs

JURY DEMAND

Plaintiff, by and through counsel, respectfully demands trial by jury on all issues herein alleged.

DATED this 2nd day of May 2006.

MORIARITY, BADARUDDIN & BOOKE, LLC

JACQUE M. RAMOS
Attorney for Plaintiffs

Tab B

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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

SHARON WILLIAMS and LYNN WILLIAMS, Plaintiffs, vs. STAGS CAR CLUB, et al., Defendants.	**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND FINAL JUDGMENT PURSUANT TO RULE 54(b)** Civil No. 060900323 Judge Ernest W. Jones

Defendants Jim Burkdoll, Devin Ellis, Scott Hammon, Gary McDaniel, Ray Page, Don Palfreyman, and Jim Vowles' Motion to Dismiss, which was joined by all defendants who are club members, except Ralph Wiggins, came on for hearing before The Honorable Ernest W. Jones on November 1, 2006, at 10:30 a.m. Plaintiffs were represented by their counsel, Jacque M. Ramos of MORIARITY, BADARUDDIN & BOOKE; defendants Jim Burkdoll, Devin Ellis, Scott Hammon, Gary McDaniel, Ray Page, Don Palfreyman, and Jim Vowles were represented

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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

SHARON WILLIAMS and LYNN WILLIAMS, Plaintiffs, vs. STAGS CAR CLUB, et al., Defendants.	**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND FINAL JUDGMENT PURSUANT TO RULE 54(b)** Civil No. 060900323 Judge Ernest W. Jones

Defendants Jim Burkdoll, Devin Ellis, Scott Hammon, Gary McDaniel, Ray Page, Don Palfreyman, and Jim Vowles' Motion to Dismiss, which was joined by all defendants who are club members, except Ralph Wiggins, came on for hearing before The Honorable Ernest W. Jones on November 1, 2006, at 10:30 a.m. Plaintiffs were represented by their counsel, Jacque M. Ramos of MORIARITY, BADARUDDIN & BOOKE; defendants Jim Burkdoll, Devin Ellis, Scott Hammon, Gary McDaniel, Ray Page, Don Palfreyman, and Jim Vowles were represented

by their counsel, Melinda A. Morgan of RICHARDS, BRANDT, MILLER & NELSON; defendants Greg Warg and B.J. Burkdoll were represented by their counsel Michael K. Woolley of RICHARDS, BRANDT, MILLER & NELSON; defendant Ralph S. Wiggins was represented by his counsel Clifford J. Payne of NELSON, CHIPMAN, QUIGLEY & PAYNE; defendant Brent G. Bodily was represented by his counsel Mark R. Anderson of WILLIAMS & HUNT; defendant Mack White was represented by his counsel Daniel S. McConkie of KIRTON & MCCONKIE; defendants Stags Car Club, Adam Christofferson, Craig Christofferson, Jack Harris, Bruno Perry, and John Elwess represented by their counsel David M. Connors of CHAPMAN & CUTLER; defendant Brent Keyes was represented by his counsel Gary L. Doehling of DOEHLING & DRISCOLL; and, defendants Dennis Bench, Robert Eames, Mickey Ellis, Jerry Fulmer, Dale Hammon, Mike Howell, Dave Squires, Bruce Woolsey, Ryan Woolsey, Bill New, and Scott New were represented by their counsel David R. Hamilton of DAVID R. HAMILTON, P.C.

The court, having reviewed the pleadings in this matter, having heard oral argument thereon, and otherwise being fully advised in the premises, hereby makes the following ruling.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that:

1) in their Amended Complaint and Jury Demand, plaintiffs fail to state a claim upon which relief may be granted against all defendants who are club members, except Ralph Wiggins, since they fail to plead that these members acted in furtherance of the tort which harmed plaintiff;

2) the above-entitled action be, and the same is hereby, dismissed with prejudice against all defendants who are club members, except Ralph Wiggins;

3) this Order of Dismissal serves as a Final Judgment, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, as to all defendants who are club members, except Ralph Wiggins, since there is no just reason for delay, and this court hereby expressly directs that an entry of Final Judgment be entered for these defendants; and,

4) two defendants still remain in this case, Ralph Wiggins and Stags Car Club.

DATED this 30 day of Nov, 2006.

BY THE COURT

HONORABLE ERNEST W. JONES
District Judge

APPROVED AS TO FORM:

MORIARITY, BADARUDDIN, & BOOKE

JACQUE M. RAMOS
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand-delivered on this 16th day of November, 2006, to the following:

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and that it was mailed, first-class, postage prepaid, on this same day, to the following:

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR WEBER COUNTY, STATE OF UTAH

SHARON WILLIAMS and LYNN WILLIAMS,

Plaintiffs,

vs.

STAGS CAR CLUB, a Voluntary Unincorporated Association; RALPH S. WIGGINS, and JOHN DOE 1; DENNIS BENCH; JOHN DOE 2; BRENT BODILY; JOHN DOE 3; ADAM CHRISTOFFERSON; JOHN DOE 4; CRAIG CHRISTOFFERSON; JOHN DOE 5; ROBERT EAMES; JOHN DOE 6; DEVON ELLIS; JOHN DOE 7; MICKEY ELLIS; JOHN DOE 8; JERRY FULMER; JOHN DOE 9; JIMMY GERMER; JOHN DOE 10; DALE HAMMON; JOHN DOE 11; SCOTT HAMMON; JOHN DOE 12; MIKE HOWELL; JOHN DOE 13; BRENT KEYES; JOHN DOE 14; RAY PAGE; JOHN DOE 15; DON PALFREYMAN; JOHN DOE 16; DAVE SQUIRES; JOHN DOE 17; GREG WARG; JOHN DOE 18; MAC WHITE; JOHN DOE 19; BRUCE WOOLSEY; JOHN DOE 20; RYAN WOOLSEY; JOHN DOE 21; BJ BURKDOLL; JOHN DOE 22; JIM BURKDOLL; JOHN DOE 23; GARY MCDANIEL; JOHN DOE 24; JIM VOWLES; JOHN DOE 25; JOHN ELWESS; JOHN DOE 26; HAROLD LUNI; JOHN DOE 27; BILL NEW; JOHN DOE 27; BILL NEW; JOHN DOE 28; SCOTT NEW; JOHN DOE 29; JOHN NEW; JOHN DOE 30; BRAD NEW; JOHN DOE 31; JACK HARRIS; JOHN DOE 32; BRUNO PERRY; JOHN DOE 33; LYLE MASON; JOHN DOE 34; BOB LARVEE, JR., AND JOHN DOES 35-100.

Defendants.

JAN 17 2007

[PROPOSED]
FINDINGS AND RATIONALE FOR CERTIFYING ORDER DISMISSING INDIVIDUAL DEFENDANTS AS FINAL PER RULE 54(b)

060900323
Civil No. 06090323

Judge Ernest W. Jones

The Court, having considered the briefing submitted by the parties on the issue of certifying the order dismissing the individual defendants (except for Ralph Wiggins) as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, and being advised as to the record and facts in this case, and otherwise finding good cause therefore, hereby issues the following findings, conclusion, and order outlining the Court's rationale for granting certification:

STANDARD FOR CERTIFICATION

Utah case law interpreting Rule 54 indicates that three requirements must be met for entry of a final judgment: (1) there must be multiple claims for relief or multiple parties; (2) the judgment or order must be an order that would be appealable but for the fact that the other claims or parties remain in the action; and (3) the trial court, in its discretion, must make a determination that there is no just reason for delay for entry of the final judgment. Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1101; Pate v. Marathon Steel Co., 692 P.2d 765, 767 (Utah 1984). All three requirements are satisfied here

FINDINGS RELATING TO CERTIFICATION

1. There are multiple parties to the action and all of the individual club members named as defendants have been dismissed, leaving as the only remaining defendants the Stags Car Club as an entity and Ralph Wiggins, the driver who ran over the plaintiff.

2. The order wholly disposes of the individual defendants, and final judgment would be entered in favor of them but for the fact that the club and Ralph Wiggins remain.

3. There is no factual overlap between the certified claims and remaining claims.

4. No facts were relied upon in deciding the motion to dismiss of the individual defendants; rather, the motion to dismiss was granted on the pleadings.

5. The allegations made against the individual club members were different from the allegations made against the club as an entity and different from the allegations against Ralph Wiggins.

6. The claims against the individual defendants were dismissed.

7. Whether or not the individual club members owed duties of care in their individual capacities by virtue of their membership in the club is different from, and requires no factual overlap with, whether the club owes a duty as an entity, and whether Ralph Wiggins owes as duty as the alleged active tortfeasor who injured the Plaintiff with his truck.

RATIONALE FOR CERTIFICATION

First, there are multiple parties to the action and all of the individual club members named as defendants have been dismissed (except for one – the driver who ran over the plaintiff). Two parties remain: Stags Car Club, as an entity, and Ralph Wiggins.

Second, the order dismissing these individual defendants would be appealable but for the fact that the entity Stags Car Club, and Ralph Wiggins, remain as parties. The order wholly disposes of the individual defendants, and final judgment would be entered in favor of them but for the fact that the club and Ralph Wiggins remain. There is no factual overlap between the

certified claims and remaining claims. Indeed, no facts were relied upon in deciding the motion to dismiss of the individual defendants. Rather, the motion to dismiss was granted on the pleadings. The allegations made against the individual club members were different from the allegations made against the club as an entity and different from the allegations against Ralph Wiggins. Accordingly, the claims against the individual defendants were dismissed. Whether or not the individual club members owed duties of care in their individual capacities by virtue of their membership in the club is different from, and requires no factual overlap with, whether the club owes a duty as an entity, and whether Ralph Wiggins owes as duty as the alleged active tortfeasor who injured the Plaintiff with his truck.

Third, there is no just reason to delay entry of a final judgment as to the individual defendants. Entry of a final judgment as to the individual defendants will promote efficiency and serve the ends of justice. It will permit final resolution of the dispute between them and Plaintiffs; whereas if final judgment is not entered as to the individual defendants at this time, they will not obtain a final resolution of this matter until Plaintiffs' dispute with Stags Car Club as an entity and Ralph Wiggins is resolved, unnecessarily prolonging their involvement. Any appellate litigation involving the individual defendants should be resolved now, so as to not prolong their involvement in this matter.

ORDER

Accordingly, based upon the findings and rationale set forth above, the Order dismissing the individual defendants (except for Ralph Wiggins) was properly certified as final for purposes of Rule 54(b).

Dated this 12 day of January, 2007.

BY THE COURT:

Hon. Ernest W. Jones
District Judge
Second Judicial District Court, District of Utah

Respectfully served upon counsel and submitted to the Court for signature this 9 day of January, 2007.

RICHARDS BRANDT MILLER & NELSON

Gary L. Johnson
Michael K. Woolley
Attorneys for Defendants Greg Warg and BJ Burkdoll

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FINDINGS AND RATIONALE FOR CERTIFYING ORDER DISMISSING INDIVIDUAL DEFENDANTS AS FINAL PER RULE 54(b) was mailed, first-class, postage prepaid, on this 10 day of Jan., 2006, to the following:

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